UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Lykos

Mailed: November 30, 2005

Opposition Nos. 91115866 and 91157981

Cancellation Nos. 92028126; 92028127; 92028130; 92028133; 92028145; 92028155; 92028171; 92028174; 92028199; 92028248; 92028280; 92028294; 92028314; 92028319; 92028325; 92028342 and 92028379

Prairie Island Indian Community, Plaintiff

v.

Treasure Island Corp., Defendant

(as consolidated)

Angela Lykos, Interlocutory Attorney

This case now comes up for consideration of defendant's motion to strike portions of plaintiff's notice of reliance. The motion is fully briefed.[1]

Plaintiff seeks to strike the following material contained in defendant's notice of reliance: (1) certain

[1] The Board has exercised its discretion to consider defendant's reply brief. *See* Trademark Rule 2.127(a).

e-mail communications retrieved from plaintiff's business records (Exhibits B-E); and (2) a copy of plaintiff's Minnesota state trademark registration (Exhibit F).

Considering first the e-mail communications, defendant contends that these documents should be stricken from the record because they do not constitute printed publications or public records that may be permissibly made of record through the filing of a notice of reliance under Trademark Rule 2.122; and furthermore, that the documents were not produced during discovery or introduced into evidence through the testimony of a person who could properly authenticate and identify the materials.

In response thereto, plaintiff maintains that contrary to defendant's assertion, Exhibit B was submitted as an exhibit to a testimony deposition taken by plaintiff; and that the remaining e-mails were properly submitted under notice of reliance because they were obtained from plaintiff's business records.

Certain types of evidence, such as official records and printed publications, may be made of record by filing the materials with the Board under cover of one or more notices of reliance during the testimony period of the offering party. The term "official records" however, as used in Trademark Rule 2.122(e), refers not to private business records, but rather to the records of public offices or

agencies, or records kept in the performance of duty by a public officer. *See Black's Law Dictionary* (Fifth Edition, 1979), and *Conde Nast Publications Inc. v. Vogue Travel, Inc.,* 205 USPQ 579 (TTAB 1979); *see also* Fed. R. Civ. P. 902(4). E-mail communications kept in the normal course of business therefore do not fall within the category of "official records" within the meaning of Trademark Rule 2.122(e), and are not admissible unless a foundation has been laid -- by testimony, unless otherwise stipulated -- demonstrating that the materials sought to be introduced are generally available to the public. *See c.f. Glamorene Products Corp. v. Earl Grissom Co.,* 203 USPQ 1090 (TTAB 1939); *see also* TBMP § 704.08 (2d ed. rev. 2004) and cases cited therein.

Insofar as plaintiff's e-mail communications were not introduced by testimony demonstrating that the materials are generally available to the public, they fail to qualify as "official records" and cannot be submitted under notice of reliance. Accordingly, defendant's motion to strike Exhibits B-E is granted.

Next we turn to defendant's motion to strike plaintiff's Minnesota state trademark registration (Exhibit F). Defendant argues that plaintiff's state trademark registration is inadmissible because it is a photocopy, and not the original record or certified copy of that record.

In response, plaintiff contends that it properly made the photocopy of the state registration of record by submitting it by notice of reliance.

Section 704.03(b)(1) of the TBMP provides in relevant part:

> A state registration owned by a party to a Board inter partes proceeding may be made of record therein by notice of reliance under 37 CFR § 2.122(a), or by appropriate identification and introduction during the taking of testimony, or by stipulation the parties.

Thus, pursuant to Board procedure, plaintiff properly made its state registration of record by notice of reliance. Accordingly, defendant's motion to strike plaintiff's Minnesota state trademark registration from plaintiff's notice of reliance is denied.[2]

Trial dates remain as set in the Board’s order dated September 7, 2005.

[2] Defendant's challenge of the validity of plaintiff's Minnesota State trademark registration is not a proper ground for a motion to strike, and has therefore been given no consideration.